DEC 29 1999

No. 99-62

Supreme Court, U.S.
FILED
DEC 29 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF SENATOR JAMES M. INHOFE (R OKLAHOMA); CONGRESSMEN MARK E. SOUDER (R IN 4), JOSEPH R. PITTS (R PA 16), RICHARD K. ARMEY (R TX 26), TOM DELAY (R TX 22), ROBERT B. ADERHOLT (R AL 4), BOB BARR (R GA 7), ROSCOE G. BARTLETT (R MD 6), JOE L. BARTON (R TX 6), HELEN CHENOWETH-HAGE (R ID 1), JAMES DEMINT (R SC 4), JAY W. DICKEY (R AK 4), VIRGIL H. GOODE, JR. (D VA 5), RALPH M. HALL (D TX 4), JOHN N. HOSTETTLER (R IN 8), SAM JOHNSON (R TX 3), SUE MYRICK (R NC 9), RON PAUL (R TX 14), TOM TANCREDO (R CO 6), ZACH WAMP (R TN 3), DAVE WELDON (R FL 15); AND WALLBUILDERS, INC.
in support of the *Petitioner*

Barry C. Hodge
Counsel of Record for Amici Curiae
The National Legal Foundation
11521-E Midlothian Turnpike
Richmond, VA 23235
(804) 897-2340

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. **INTRODUCTION—THE SEARCH FOR PROPER PRINCIPLES** 3

II. **THE PROPER APPROACH UNDER *LEMON*** 10

III. **THE PROPER APPROACH *UNDER LEE V. WEISMAN*** 15

IV. **THE FIFTH CIRCUIT'S NEW ESTABLISHMENT CLAUSE TEST** 19

V. **THE FIFTH CIRCUIT'S ANALYSIS CREATES HOSTILITY, NOT NEUTRALITY, TOWARD RELIGION** 20

VI. **THE PROBLEMS WITH THE SOLEMNIZATION TEST** 26

CONCLUSION 30

TABLE OF AUTHORITIES

CASE — PAGE

Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) 15, 25

ACLU of New Jersey v. Black Horse Pike Regional Bd. of Ed., 84 F.3d 1471 (3d Cir.1996) (*en banc*) 11

Adler v. Duval Co. Sch. Bd., 174 F.3d 1236 (11th Cir. 1999) 10-11, 13-15

Agostini v. Felton, 521 U.S. 203 (1998) 15

Allegheny County v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989) 7, 16, 24-25

Bd. of Ed. of Kiryas Joel. v. Grumet, 512 U.S. 687, 694-96 (1994) 5-9

Bd. of Ed. of Westside Community Sch. v. Mergens, 496 U.S. 248 (1990) 20-21, 23

Chandler v. James, 180 F.3d 1254 (11th Cir. 1999) 2, 12-14,19

Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514 (11th Cir.1993) 10-11

City of Edmond v. Robinson, 134 L. Ed. 2d 801 (*cert. denial*) 9

TABLE OF AUTHORITIES CONTINUED

Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir.1995) 3-4, 27-28

Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832 (9th Cir.1998) 11

Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (5th Cir.1999) 3-4, 11, 15, 18-23, 26-29

Doe v. Santa Fe Indep. Sch. Dist., 171 F.3d 1013 (5th Cir.1999) (denial of rehearing *en banc*) 10, 26

Edwards v. Aguillard, 482 U.S. 578 (1987) 10

Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994) 11

Hogue v. Johnson, 131 F.3d 466 (5th Cir. 1997) 21

Jager v. Douglas County Sch. Dist., 862 F.2d 824, (11th Cir. 1989) 11

Jones v. Clear Creek Ind. Sch. Dist., 977 F.2d 963 (5th Cir. 1992) 10, 15, 20-23, 26-28

Larkin v. Grendel's Den, Inc., 459 U.S. 116 8

Lee v. Weisman, 505 U.S. 577 (1992) 2, 7, 9, 15-19, 22, 27-28

Lemon v. Kurzman, 403 U.S. 602 (1971) 2, 5-9, 11-13, 15, 28

TABLE OF AUTHORITIES CONTINUED

Lynch v. Donnelly, 465 U.S. 668 (1984)..... 7, 10, 16, 24

Serbian Eastern Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976)..... 7

Stone v. Graham, 449 U.S. 39 (1980)..... 7

Wallace v. Jaffree, 472 U.S. 38 (1985)..... 10, 16

Walz v. Tax Comm'n of New York City,
397 U.S. 664 (1970)..... 24

Zorach v. Clauson, 343 U.S. 306 (1952)..... 23-24, 29

INTEREST OF AMICI CURIAE[1]

Amici curiae Senator James M. Inhofe (R Oklahoma) and Congressmen Mark E. Souder (R IN 4), Joseph R. Pitts (R PA 16), Richard K. Armey (R TX 26), Tom DeLay (R TX 22), Robert B. Aderholt (R AL 4), Bob Barr (R GA 7), Roscoe G. Bartlett (R MD 6), Joe L. Barton (R TX 6), Helen Chenoweth-Hage (R ID 1), James DeMint (R SC 4), Jay W. Dickey (R AK 4), Virgil H. Goode, Jr. (D VA 5), Ralph M. Hall (D TX 4), John N. Hostettler (R IN 8), Sam Johnson (R TX 3), Sue Myrick (R NC 9), Ron Paul (R TX 14), Tom Tancredo (R CO 6), Zach Wamp (R TN 3), and Dave Weldon (R FL 15) are members of the United States Senate and of the United States House of Representatives. Senator Inhofe represents the state of Oklahoma with a population of approximately 3.3 million. Each member of the House represents approximately 600,000 to 650,000 constituents. In total these amici represent approximately 15.8 million Americans. Each of these amici is acutely aware that the decision of this Court in this case will impact his or her constituents and believes that it is not in the best interest of those constituents to deny them the right to engage in prayers at various public events. Although this case involves a facial challenge to one school district's policy that might or might not even result in prayers at football games, amici are aware that the possible ramifications of the decision are much broader than the limited facts of the present controversy.

Amicus curiae WallBuilders, Inc. is a 501c (3) organization that is dedicated to the restoration of the moral and religious foundation on which America was built. As

[1] Counsel of record to the parties in this case have consented to the filing of this brief through blanket consent letters which have been filed with the Clerk. Additionally, Counsel for Jane Doe, et al. has consented by individual letter to Counsel of Record for amici. No counsel for any party has authored this brief in whole or in part. No person or entity, other than the amicus curiae WallBuilders, Inc., has made any monetary contribution to the preparation or submission of this brief.

such, the organization has a direct interest in seeing that students be allowed to pray if they so desire.

SUMMARY OF ARGUMENT

Justice O'Connor has warned that Establishment Clause jurisprudence, including the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), must be applied in a manner that takes into account the various different categories of Establishment Clause cases. Justice Kennedy issued a similar warning in *Lee v. Weisman*, 505 U.S. 577 (1992), that applies to *Lee* itself. When these warnings are heeded, these tests will not be applied woodenly. When the underlying principles are understood, Santa Fe's Football Prayer Policy is clearly constitutional. The Eleventh Circuit's recent case of *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), provides a good model for how to apply Establishment Clause principles to the case at bar.

By way of contrast, the test employed by the Fifth Circuit panel in this case should be rejected. The panel opinion in this case introduced a new test into the already confused Establishment Clause Jurisprudence, namely the "solemnization test." Under this test, the court said that football games were not the type of events that are capable of being solemnized. Therefore, students cannot pray at football games. This test is bad for two reasons. First, the school proffered other secular purposes, but these reasons were ignored. But second and more importantly, any type of public prayers at public events can now be challenged as inappropriate under the theory that the event in question cannot be solemnized.

In addition to these problems, the test seems to be driven by an impermissible hostility towards religion.

If the Supreme Court adopts this test, the implications are obvious and disconcerting. This country will face years of litigation in which prayers at various public events will be

challenged. In all of these cases, judges will have no legal principle to guide them—it will all be the judge's opinion.

ARGUMENT

I. INTRODUCTION—THE SEARCH FOR PROPER PRINCIPLES

This case is of great interest and significance to the American people. Prayer at public events is a long standing tradition in this country—a tradition that should be allowed to continue unless and until someone can demonstrate that it violates the Constitution. In this case as in many others, a federal court has declared that such prayers—this time at football games—are, in fact, unconstitutional. Yet as this case comes before this Court, it is hard to tell *why* the Fifth Circuit held the Policy regarding student-led, student-initiated speech at football games to be unconstitutional. The policy simply allows for students to decide whether they will have a speaker prior to sporting events. If students so chose, the policy allows the selected student to decide whether his or her private speech will include a "brief invocation and/or message." *Doe v. Santa Fe Ind. Sch. Dist.*, 168 F.3d 806, 812 (5th Cir. 1999).

In part it is hard to tell why the Fifth Circuit held the Football Pre-game Policy unconstitutional because the court dedicated most of its opinion to the issue of the School District's policy on graduation prayer and gave short shrift—indeed just one paragraph—to its analysis of the Football Policy. But that is not the only reason it is difficult to discover the court's rationale. The Fifth Circuit's rationale is also hard to understand because it did little more than quote the holding of one of its prior cases, *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

However, there are two interrelated problems with the *Santa Fe* court's use of *Duncanville*. First, the court significantly altered the quotation upon which it relied. The

Santa Fe court quoted the *Duncanville* court as saying, "Here, we are dealing with a setting [football and basketball games] far less solemn and extraordinary . . . ." *Santa Fe*, 168 F.3d at 822-23 (*quoting Duncanville*) (alteration original to *Santa Fe*). But this is simply not a justifiable alteration of the quotation. The *Duncanville* court was dealing with school employee-supervised prayers at basketball team practices, in the basketball team locker room, after basketball games at center court, and on the basketball team bus. The *Duncanville* court specifically stated: "DISD [Duncanville Independent School District] makes no attempt to distinguish the prayers given before football games and at awards ceremonies from those given at basketball games. *To the extend that these situations are materially alike*, our opinion applies equally." *Duncanville*, at 405, n.2 (emphasis added).

Whether or not there are material differences between the various basketball prayers at issue in *Duncanville* and that district's football prayers, there are clearly material differences between Duncanville's basketball prayers and Santa Fe's Football Game Message Policy at issue here. As just one example, the Message Policy at issue here does not authorize prayers conducted under the direct supervision of a school employee who routinely and repeatedly has control of a small number of the same students, as were the prayers in *Duncanville*. *Duncanville* at 404. Thus, the *Duncanville* analysis does not, at least on its face, apply to the *Santa Fe* case at all. Yet that is as close to an articulated rationale as the court gave.[2]

This points to the second interrelated problem. The *Santa Fe* court was not careful to apply the proper

---

[2] It is true that the court stated in a footnote early in its opinion that "Although for the sake of simplicity and clarity we address SFISD's arguments only as they relate to graduation ceremonies, our analysis applies with equal, if not greater, force to the Football Policy as well." Santa Fe at 814, n.7. However, one of the graduation prayer policies was *upheld*. The only grounds for declaring the Football Pre-game Policy *un*constitutional was the solemnization issue.

Establishment clause principles in a highly sensitive, fact-specific, "case-category-specific"[3] manner. Instead it merely took some Establishment Clause verbiage—entirely out of context—and applied it without even trying to distill the underlying principles and separating those that applied to the facts before it from those that did not.

The *Santa Fe Court* is not alone in this shortcoming. Indeed, many federal courts have failed to abide by the admonitions of several members of this Court that Establishment Clause cases must be analyzed using only those principles that are appropriate to various sub-categories of cases.

Had the court analyzed the Football Pre-game Policy with this admonition in mind, it would have found the prayers constitutional, whether it had used the *Lemon* test or the *Lee* test. Whether one employs *Lemon* or *Lee* or both, one must beware the problem described by Justice O'Connor in the following lengthy but important passage:

> It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause. . . .
>
> But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry-personal liberty, an informed citizenry,

[3] See *infra* for discussion of this term.

government efficiency, public order, and so on-are present in different degrees in each context.

And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless. I suppose one can say that the general test for all free speech cases is "a regulation is valid if the interests asserted by the government are stronger than the interests of the speaker and the listeners," but this would hardly be a serviceable formulation. Similarly, *Lemon* has, with some justification, been criticized on this score.

Moreover, shoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test. Relatively simple phrases like "primary effect . . . that neither advances nor inhibits religion" and "entanglement," acquire more and more complicated definitions which stray ever further from their literal meaning.

Bd. of Ed. of Kiryas Joel. v. Grumet, 512 U.S. 687, 718-19 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

After drawing these parallels between this Court's Free Speech and Establishment Clause jurisdiction, Justice O'Connor went on to explain the dangers present in trying to woodenly apply the *Lemon* test to the wide diversity of Establishment Clause cases the courts have had to deal with:

> I think it is more useful to recognize the relevant concerns in each case on their own terms, rather than trying to squeeze them into language that does not really apply to them.

Finally, another danger to keep in mind is that the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened with *Lemon*.

Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches. Some cases, like this one, involve government actions targeted at particular individuals or groups, imposing special duties or giving special benefits. Cases involving government speech on religious topics, see, e.g., *Lee v. Weisman*, supra; *Allegheny County v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Stone v. Graham*, 449 U.S. 39 (1980), seem to me to fall into a different category, and to require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion. *See Allegheny County*, *supra*, at 623-637 (O'Connor, J., concurring in part and concurring in judgment).

Another category encompasses cases in which the government must make decisions about matters of religious doctrine and religious law. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). . . . Government delegations of power to religious bodies may make up yet another category. As

> *Larkin* itself suggested, government impartiality towards religion may not be enough in such situations: A law that bars all alcohol sales within some distance of a church, school, or hospital may be valid, but an equally evenhanded law that gives each institution discretionary power over the sales may not be. *Larkin*, supra, at 123-124. *Of course, there may well be additional categories, or more opportune places to draw the lines between the categories.*

Id. at 719-21 (emphasis added).

Having already pointed out some of the problems with an overly-unitary approach, Justice O'Connor then discussed some of the advantages of the case-category-specific approach:

> As the Court's opinion today shows, the slide away from *Lemon's* unitary approach is well under way. A return to *Lemon*, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions. I think a less unitary approach provides a better structure for analysis. If each test covers a narrower and more homogeneous area, the tests may be more precise and therefore easier to apply. There may be more opportunity to pay attention to the specific nuances of each area. There might also be, I hope, more consensus on each of the narrow tests than there has been on a broad test. And abandoning the *Lemon* framework need not mean abandoning some of the insights that the test reflected, nor the insights of the cases that applied it.

> . . . [I]t seems to me that the case law will better be able to evolve towards this if it is freed from the *Lemon* test's rigid influence. The hard questions would, of course, still have to be asked; but they will be asked within a more carefully tailored and less distorted framework.

Id. at 721.

This quotation is not invoked here to advocate that this Court ignore or reject *Lemon* (although that could be considered a major thrust of Justice O'Connor's comments). As has been pointed out repeatedly, *Lemon* has never been overturned. Rather, the point is to note that whether one uses *Lemon* or *Lee*, the analysis must be case-category specific.[4]

In fact, Justice O'Connor's process could be, indeed should be, followed even further. For example, she discussed *Lee* with *Allegheney County* and *Stone*. Yet there are important differences between graduation prayer cases and religious display cases. One such difference is that the religious display category of Establishment Clause cases have different standing rules than other Establishment Clause cases in at least some Circuits. *See, e.g., City of Edmond v. Robinson*, 134 L. Ed. 2d 801 (*cert. denial*) (Rehnquist, C.J., Scalia, Thomas, JJ., *dissenting*).

Thus, the lesson of Justice O'Connor's quotation is that under both *Lemon* and *Lee*, one must use a very case-category specific approach. A principles-not-prongs approach will produce the best results. When courts do not heed this warning, jurisprudential chaos is the result.

---

[4] Nor is it the purpose of this brief to suggest other replacement tests. Amici believe that it *would* be possible to have a more unified approach to Establishment Clause jurisprudence were that jurisprudence truer to the intent of the Framers. The entire discussion in this brief is based on "what is," not on what "might be" or "what ought to be."

II. THE PROPER APPROACH UNDER *LEMON*

The decision of the *Santa Fe* court has seriously exacerbated the confused Establishment Clause jurisprudence in the Fifth Circuit. In fact, six judges joined a dissenting opinion filed by a seventh judge in the Denial of Rehearing *En Banc* in the present case. *Doe v. Santa Fe Ind. Sch. Dist.*, 171 F.3d 1013, 1014 (5th Cir. 1999). Judge Jolly, who wrote the dissent, and his colleagues aimed some unusually harsh words at the panel decision. For example, the dissent states:

> The *Santa Fe* majority also casts our Circuit's Establishment Clause jurisprudence into throes of uncertainty. The majority opinions in *Santa Fe* and *Jones v. Clear Creek Independent Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), are so clearly in conflict with each other that school districts within our jurisdiction will have no guidance on how to interpret our confused precedent.

Id. at 1015. Although most of what was written in the opinion was aimed at that part of the panel decision that discussed graduation prayers, it is true that *Santa Fe* has created a "jurisprudential quagmire" in the Fifth Circuit. *Id.* We have reached a sad state of affairs when seven judges characterize their own jurisprudence in this manner.

And the Fifth Circuit is by no means alone. Perhaps an even more egregious example of ignoring the use of sub-category specific analysis is provided by the recent panel decision in *Adler v. Duval Co. Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999) (*Adler II*). *Adler II* involved graduation prayers. In its *Lemon* analysis, the *Adler II* court looked at cases dealing with creation science, *Edwards v. Aguillard,* 482 U.S. 578 (1987); moments of silence, *Wallace v. Jaffree*, 472 U.S. 38 (1985); nativity scenes, *Lynch v. Donnelly,* 465 U.S. 668 (1984), charitable solicitation laws, *Church of Scientology*

Flag Serv. Org., Inc. v. City of Clearwater, 2 F.3d 1514 (11th Cir.1993), and prayer at football games, *Jager v. Douglas County Sch. Dist.,* 862 F.2d 824, (11th Cir. 1989), in addition to cases dealing with graduation prayer. Presumably, *some* of the propositions for which these cases were cited could validly be applied across categories. Nonetheless, the overall result was exactly what Justice O'Connor predicted it would be—confusion.

Unfortunately, an already bad result was compounded because the graduation prayer cases that the *Adler II* majority cited, *Doe v. Santa Fe Indep. Sch. Dist.,* 168 F.3d 806 (5th Cir.1999) (the case now, in part, before this Court); *Doe v. Madison Sch. Dist. No. 321,* 147 F.3d 832 (9th Cir.1998); *ACLU of New Jersey v. Black Horse Pike Regional Bd. of Ed.,* 84 F.3d 1471 (3d Cir.1996) (*en banc*); *Harris v. Joint Sch. Dist. No. 241,* 41 F.3d 447, (9th Cir. 1994), went even further afield and incorporated this cross-categorical analysis multiple times over. The cases utilized by the *Santa Fe, Madison, Black Horse, and Harris* courts in their *Lemon* analyses included the following Establishment Clause categories: tax funding, services, religious displays (in and out of schools), baccalaureate services, equal access, Bible reading, release time, publishing, moments of silence, legislative chaplains, employment, and school districting cases, in addition to school prayer cases in numerous settings, including the classroom, assemblies, after school, and at sports events. See *Santa Fe, Madison, Black Horse, and Harris, passim.*

Because of this state of affairs and because of our concern over the disastrous results it is producing around the country, *amici* urge this Court to give guidance to the federal courts in how to apply Establishment Clause principles. Even without this Court overruling *Lemon*, the federal courts should be capable of ascertaining and applying *appropriate* Establishment Clause principles to various categories of prayer cases.

As an example of a court that got it right, *amici* suggest the approach of the Eleventh Circuit Court of Appeals in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999). In Chandler, the Eleventh Circuit had before it an injunction issued by a trial court that prohibited, among other things, a school district from permitting certain religious activities by students at events such as football games, graduation ceremonies, and other school events. The Alabama Attorney General's Office challenged the injunction specifically as it related to the aspects just mentioned, i.e, prohibiting student religious speech at various events including football games. *Id.* at 1257-58. The Eleventh Circuit vacated the entire injunction holding that the prohibition against permitting student religious speech violate the First Amendment. *Id.* at 1266. Given that religious speech at sporting events was involved, the analysis of the *Chandler* court is very instructive in the instant case.

The *Chandler* court never engaged in a standard prong-by-prong *Lemon* analysis. In fact, other than in a parenthetical in footnote 12, the *Chandler* court never even mentioned *Lemon*. Indeed, the lion's share of its analysis was done under the headings of Free Exercise and Free Speech. Yet one finds throughout the Establishment, Free Exercise, and Free Speech portions of the opinion—in a nuanced and case-category appropriate manner—*Lemon's* Establishment Clause *principles*. For example, in analyzing other cases, the *Chandler* court spoke of "the State's decision to create an exclusively religious medium . . . not the 'permitting' of religious speech . . ." *Chandler,* 180 F.3d at 1259. This is the language of purpose. The opinion addresses whether certain practices advance or endorse religion; it speaks of hostility and neutrality. *Id.* at 1259-1265. The opinion discusses teacher participation that creates entanglement. *Id.* at 1264.

Thus, *Chandler* utilized *Lemon's* principles without ever invoking the test itself. Yet *where appropriate*, the *Lemon* principles were utilized. And the result was much more desirable, in that that court also heeded Justice

O'Connor's admonition to pay attention to case categories. The *Chandler* court did not woodenly examine what various other courts had said under each of *Lemon's* prongs, regardless of context, and thereby introduce extraneous statements applicable to totally different categories of cases. Other than one sentence that quickly summarized several lower court graduation cases, *Id.* at 1259, the *Chandler* court stuck almost exclusively[5] to Supreme Court cases involving prayer and other religious speech in academic contexts. *Id.* at 1257-1265.

The conclusion of the *Chandler* court under its category-specific-principles-not-prongs approach to *Lemon* is clear: Schools cannot refuse to permit students to speak religiously at school-organized or -sanctioned events. *Id.* at 1265. *Chandler's* message is also clear that courts may not order schools to refuse to permit such speech. *Id.* Quite to the contrary, schools have a constitutional *duty* to affirmatively permit this speech. *Id.* at 1263. Thus, under the principles of *Lemon*, as appropriately applied in *Chandler*, the Football Policy in this case is constitutional.

It is of interest to note that *Adler II* and *Chandler* both came out of the Eleventh Circuit. This highlights the confusion that exists in the federal courts. If we continue to use *Adler II* and *Chandler* as examples of a court that got it right and a court that got it wrong, we gain several more useful insights.

Suppose one takes the approach of the *Adler II* majority. The majority did not examine the prayer guidelines before it under *Lemon's* excessive entanglement prong. However, it found that both the policy's purpose and its effect were to "permit prayer." *Adler II*, 174 F.3d at 1249-51. Of course, some will disagree with these assertions. They will find the arguments contained in the dissent more persuasive. *See id.* at 1265-71. But let us assume *arguendo* that the *Adler*

[5] Most notably, there are several references to *Lynch*. There are other minor exceptions as well.

II majority was correct. If the purpose and effect of the guidelines were to permit prayer, the guidelines are, as we have just seen, constitutional, not unconstitutional under *Chandler*.

Amici suggest that the *Chandler* court has struck exactly the right balance under those Establishment Clause principles which apply to prayers at school-related public events:

> How, then, does a school accommodate religious expression without commanding it? . . . the answer is simply it is to be "permitted." Not required. Not commanded. Not even suggested. Simply permitted. If students, or other private parties, wish to speak religiously while in school or at school-related events, they may exercise their First Amendment right to do so.

Chandler, 180 F.3d at 1264 (describing the position of the Defendant school board, which position the court held to be correct).

The *Chandler* court spoke other strong words on this point, stating "It would be easy simply to banish prayer from our public institutions, but this would be not only constitutionally incorrect, but also fundamentally unfair to our society." *Id.* Furthermore, the *Chandler* court called permitting students to pray a "constitutional requirement." *Id.* What the *Adler II* court found to be a constitutional infirmity, the *Chandler* court correctly characterized as a constitutional requirement. Therefore, if the *Adler II* court was right about the guidelines' purpose and effect, the guidelines are *quintessentially* constitutional. They enable the school district to fulfill its constitutional duty and they protect the rights of all. Similarly here, the Football Pre-Game Policy is quintessentially constitutional because it allows Santa Fe ISD to fulfill its constitutional duty and it protects the rights of all.

Only one thing remains to be said about the more wooden *Lemon* approach of the *Adler II* court (since we are for the moment exploring how the guidelines at issue there and the Football Pre-game Policy at issue here should fare under this approach). It may seem strange to say that "permitting prayer" serves a "secular" purpose. After all, prayer is not secular. However, there are several ready answers. The first answer is that this policy neither advances nor inhibits religion. It ensures neutrality toward religion. That is a secular purpose. (Although the neither-advances-nor-inhibits paradigm is usually associated with the effect prong, this same paradigm has been applied to the purpose prong and seems to shed light here. *See, e.g., Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963); and *Agostini v. Felton*, 521 U.S. 203, ___, 117 S. Ct. 1997, 2010 (1998).) The second answer is provided by the forum analysis approach discussed by Judge Jolly in his *Santa Fe* panel dissent: providing a neutral forum for speech serves a secular purpose. *Santa Fe,* 168 F.3d at 824-36 (Jolly, J., dissenting).

III. THE PROPER APPROACH UNDER *LEE V. WEISMAN*

The *Santa Fe* court also missed the mark on *Lee v. Weisman*. It held that the Football Pre-game Policy was unconstitutional despite being offered under a "pure Clear Creek Prayer Policy." *Santa Fe,* 168 F.3d at 822. In other words, the policy involved nonsectarian, nonproselytizing prayer such as had been upheld (at graduations) in the *Clear Creek II* case under various analyses, including a *Lee* analysis. Thus, the *Santa Fe* court believed that the Football Pre-game Policy was unconstitutional under *Lee*. But a proper understanding of the *principles* of *Lee* leads to the conclusion that the Football Pre-Game Policy is constitutional.

In *Lee*, Justice Kennedy expressed the same concern that Justice O'Connor expressed in *Kiryas Joel* (see above)

that Establishment Clause principles be utilized in case-category-fact-specific manner:

> These *dominant facts* mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are, in a fair and real sense, obligatory, though the school district does not require attendance as a condition for receipt of the diploma.
>
> This case does not require us to revisit the difficult questions dividing us in recent cases, *questions of the definition and full scope of the principles governing the extent of permitted accommodation* by the State for the religious beliefs and practices of many of its citizens. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573 (1989*); Wallace v. Jaffree,* 472 U.S. 38 (1985*); Lynch v. Donnelly*, 465 U.S. 668, (1984). For without reference to those *principles in other contexts*, the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. . . . The government involvement with religious activity *in this case* is pervasive, to the point of creating a state-sponsored and state-directed religious

> exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine *the question before us*.

Lee at 596-97 (emphasis added).

Thus, at bottom, the *principles* of *Lee* could be considered the same as the *principles* of *Lemon*. However, there is more that can profitably be gained by looking at the instant case through the lens of *Lee*. First, we should take Justice Kennedy's admonition seriously not to ignore the each case's context. Applying this principle to *Lee* itself means that if the dominant facts are not present, various prayers or prayer policies could very well be constitutional. In other words, *Lee* is deliberately self-limiting. This is evident from Justice Kennedy's own words. Justice Kennedy wrote: "We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." *Id*. at 598-99.

These words take on new meaning when one stops to think of examples. Here we are not dealing with graduation time. Therefore, we need only imagine examples of religious values, practices and persons interacting public schools and their students at other times throughout the educational process.

An example of religious values, practices and persons interacting with public schools *students* would be students encountering a sidewalk evangelist on a public sidewalk near their school. The evangelist's target audience is specifically school students, but the activities do not implicate the *school*.

But the Football Policy at issue here is an example of religious values, practices and persons interacting with *public schools* throughout the educational process. Here, the *schools* sponsor an event that involves students, parents, other

relatives, and the general public. It is in a very real sense an event of the entire community. If, in fact, the students decide to have a speaker, and if in fact, the speaker decides on his or her own initiative to include a religious sentiment, that is protected speech.

Furthermore, football games, as the *Santa Fe* court points out, are not the unique, once-in-a-lifetime event that graduation is. *Santa Fe,* 168 F.3d at 822-23. In *Lee*, Justice Kennedy described the multiplicity of unique characteristics of graduation ceremonies. *Lee*, 505 U.S. at 595. It was *because of* these characteristics and the high cost of forfeiting this unique experience that Justice Kennedy wrote that the graduation ceremony was "in a fair and real sense obligatory." Id. at 586. Whatever place high school football games may have in Santa Fe or any other community, they do not partake of the characteristics that Justice Kennedy so eloquently described. Without the same obligatory nature of the event, the principles of *Lee* indicate the constitutionality, not the unconstitutionality of the football prayers.

Another *Lee* principle also shows that the Football Policy is constitutional. The *Lee* Court explained that psychological coercion would likely occur in "a state-sanctioned religious exercise." *Id*. at 597. According to the Court, the entire graduation ceremony was not the state-sanctioned religious exercise; rather the prayer itself was the state-sanctioned religious exercise. *Id*. at 594. If there is no state-sanctioned religious exercise there is no need to be concerned about the state psychologically coercing anyone. And the *Lee* Court clearly stated that it was *clergy-led state-mandated* prayer that constituted a state-sanctioned religious exercise. *Id*. at 597. In the instant case there is no state-mandated prayer and no clergy-led prayer. Therefore, there is no state-sanctioned religious exercise and no concern over psychological coercion.

Thus, one sees that, whether analyzed under the principles of *Lemon* or the principles of *Lee*, Santa Fe ISD's Football Pre-game Policy is clearly constitutional. *Amici* urge this Court to reject the largely unarticulated and muddled approach of the *Santa Fe* court. Instead, this Court should apply a principles-not-prongs approach to the case before it. *Amici* commend the *Chandler* analysis to this Court as a paradigm of the proper approach. By adopting the *Chandler* approach, this Court will not only declare the constitutionality of the Policy at issue in this case, it will also clarify for the federal courts the proper approach to the myriad of Establishment Clause cases they encounter.

IV. THE FIFTH CIRCUIT'S NEW ESTABLISHMENT CLAUSE TEST

In contrast to the approach of the *Chandler* court, the Fifth Circuit Court of Appeals, in the present case, has adopted a dangerous new "legal test" that is not really legal at all. The Fifth Circuit has decided that public prayers will now be subjected to a "solemnization test." In holding prayers at football games unconstitutional, the court wrote "[t]he prayers are to be delivered *at football games*—hardly the sober type of annual event that can be appropriately solemnized with prayer." *Doe v. Santa Fe Indep. Sch. Dist.* 168 F.3d 806, 823 (emphasis in the original).

The ramifications of such a test are startling to say the least. This country will face years of litigation in which prayers at various public events will be challenged. Event after event will have to be categorized as either solemnizable or non-solemnizable. As more and more events are categorized, litigants will try to persuade judges that the event over which they are fighting is similar to or different from one or another event upon which some other judge has already ruled. Thus, they will argue, the new event should either be characterized as solemnizable or non-solemnizable, depending on what side of the issue they are on. And in all of

this, judges will have no legal principles to guide them—it will all be the judge's opinion (no doubt camouflaged as much as possible in legalese and precedent to try to give the appearance that principles are being invoked). This is not what American's religious liberties should depend upon.

V. THE FIFTH CIRCUIT'S ANALYSIS CREATES HOSTILITY, NOT NEUTRALITY, TOWARD RELIGION

The Fifth Circuit opinion in *Santa Fe* appears to be driven by distaste for its own decision in *Jones v. Clear Creek*, 977 F.2d 963 (5th Cir. 1992) (*Clear Creek II*), and for this Court's decision in *Bd. Of Educ. Of Westside Community Sch. v. Mergens*, 496 U.S. 248 (1990), as well. For example, the court wrote:

> There is, moreover, a crucial distinction between the speech involved in *Mergens* and the speech that SFISD's policy would allow. In *Mergens*, the Court held that permitting the Christian student organization to meet on school grounds after class and to recruit members through the school newspaper, bulletin boards, and public address system, did not violate the Establishment Clause. Thus, the organization was not permitted to deliver a religious message directly to the student body. The religious organization did not use any of the various methods of communication controlled by the school to proselytize—or to deliver religious messages of any nature—but rather confined such activities to meetings held after class with virtually no trace of governmental imprimatur. *Clear Creek II* took *Mergens* one baby step closer to the brink, allowing delivery of prayer to the student body but only if such prayer were

> nonsectarian and nonproselytizing. SFISD's July Policy, however, would plunge over the cliff, by permitting students to present overtly sectarian and proselytizing religious prayers to a group of students clearly assembled at the behest of the government.

Santa Fe, 168 F.3d at 821, n.11.

The language of taking "*Mergens* one baby step closer to the brink" implies (if not more than implies) that *Mergens* itself was headed in a dangerous direction. Yet for this court to have decided *Mergens* in the opposite manner would have been to treat religious students differently than all other students.

The *Santa Fe* court also went out of its way in several passages to point out that it had no choice but to follow *Clear Creek II*. For example, the court noted:

> In beginning our analysis, it is well to note that our role is necessarily limited to elucidating our prior precedent in the light of its context and such subsequent clarifications as the Supreme Court has announced. *See Hogue v. Johnson*, 131 F.3d 466, 491 (5th Cir. 1997) ("One panel of this Court may not overrule another [absent an intervening decision to the contrary by the Supreme Court or the en banc court . . .]."), *cert. denied*, __ U.S. __, 118 S. Ct. 1297 (1998).

Santa Fe, 168 F.3d at 814.

Indeed, some passages from the court's opinion do not merely objectively state that it is bound by *Clear Creek II*, but rather appear to engage in sarcasm or drip frustration. Several examples illustrate this:

> More to the point, we now conclude, in obeisance to the ineluctable precedent of *Clear Creek II*, that a knock-off of a Clear Creek Prayer Policy that does not limit speakers to nonsectarian, nonproselytizing invocations and benedictions violates the dictates of the Establishment Clause.

Santa Fe, 168 F.3d at 813.

And again, we read:

> Only the combination of the factors relied on in *Clear Creek II*—that the prayer was student-led *and* nonsectarian, nonproselytizing—saved that school district's graduation prayers from being anathematized a "formal religious exercise" for the purposes of *Lee's* Coercion Test. *Cf. Lee*, 505 U.S. at 588-90 (holding nonsectarian, nonproselytizing graduation prayer delivered by rabbi was "formal religious exercise"). Again, because sectarian and proselytizing prayers are by their very nature designed to promote a particular religious viewpoint rather than solemnize an otherwise purely secular event, they cannot find sanctuary in the tightly circumscribed safe harbor of *Clear Creek II* and thereby avoid the appellation "formal religious exercise."

Santa Fe, 168 F.3d at 818 (emphasis original).

Two final examples further demonstrate the attitude of the *Santa Fe* court:

> In sum, our *Clear Creek II* opinion explicitly — and (we are bound by *stare decisis* to acknowledge) correctly — relies on Clear Creek ISD's nonsectarian, nonproselytizing

> restrictions to dodge the outcome otherwise dictated by *Lee*.

Santa Fe, 168 F.3d at 822.

> Whether or not we agree with *Clear Creek II's* conclusion that the student-led graduation prayers do not transgress the Establishment Clause even though they do not constitute private speech, we are bound by its judgment unless and until this Court reconsiders the matter *en banc* or the Supreme Court holds otherwise.

Santa Fe, 168 F.3d at 821, n.12.

Distaste for *Clear Creek II* and especially for *Mergens* smacks of the hostility towards religion that this Court and various individual Justices have repeatedly said is not appropriate in this country. In *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952), this Court noted:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in

> the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Similarly, in his dissenting opinion in *Allegheny Co. v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), Justice Kennedy surveyed many of this Court's statements on hostility. In the process, he noted that:

> Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. *Lynch v. Donnelly*, *supra*, at 678; *Walz v. Tax Comm'n of New York City*, *supra*, at 669. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain

> the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

Allegheny Co., 492 U.S. at 657-58.

One opinion of this Court from which Justice Kennedy quoted in *Allegheny Co* is particularly worth repeating here:

> It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.
>
> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion . . . .

Abington Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

Hostility toward religion is no more permissible in the federal judiciary than it is in any other branch of the federal government or in state and local governments. In fact, it is even less acceptable, for it is the judicial branch that must adjudicate Establishment Clause disputes. No citizen in this

nation can expect proper results to such disputes if the federal judiciary is hostile toward religion.

Therefore, this Court should not adopt the test of a court of appeals panel that is by all appearances hostile to religion, to its own precedents, and to the precedents of this Court. (As we shall see below, whether it is hostile to the precedent of this court or not, it has in any event misapplied them.)

VI. THE PROBLEMS WITH THE SOLEMNIZATION TEST

Whether or not this distaste and hostility can be read between the lines, there is little doubt that the results are the same as if it exists. *Santa Fe* and *Clear Creek II* are in direct conflict. As noted above, this was the view of Judge Jolly and the six judges that signed on to his dissent from the Denial of Rehearing *En Banc*. *Doe v. Santa Fe Ind. Sch. Dist.*, 171 F.3d 1013 (1999). Judge Jolly wrote, "The majority opinions in *Santa Fe* and *Jones v. Clear Creek Independent Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), are so clearly in conflict with each other that school districts within our jurisdiction will have no guidance on how to interpret our confused precedent." *Id.* at 1015.

This adds to the appearance that the *Santa Fe* panel was hostile to the *Clear Creek II* decision and was determined to limit it to as narrow a field as possible. But the only way to do this was to ignore the principles that animate *Clear Creek II* and emphasize solemnization. As noted previously, the *Santa Fe* court wrote, "[t]he prayers are to be delivered *at football games*—hardly the sober type of annual event that can be appropriately solemnized with prayer." Santa Fe, 168 F.3d at 823 (emphasis in the original).

The *Santa Fe* court went on to write:

> Regardless of whether the prayers are selected by vote or spontaneously initiated at these

> frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the prayers. Thus, as we indicated in *Duncanville*, our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek Prayer Policy cannot survive. We therefore reverse the district court's holding that SFISD's alternative Clear Creek Prayer Policy can be extended to football games, irrespective of the presence of the nonsectarian, nonproselytizing restrictions.

Id.

It is true that the *Santa Fe* court's reliance upon solemnization is traceable to the Fifth Circuit's decision in *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995). But at least in *Duncanville*, solemnization was just one of several factors the court looked at. Nonetheless, the seed was planted. To the extent that the *Duncanville* and *Santa Fe* courts emphasized that graduation is a unique event, they stood this Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992) on its head.

In *Lee*, the fact that graduation is a unique event weighed against the constitutionality of the prayers, not in its favor. As noted previously, Justice Kennedy wrote:

> These *dominant facts* mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are, in a fair and real sense, obligatory, though the school district does not require

> attendance as a condition for receipt of the diploma.

Id. at 586. If the constitutionality of prayers at graduation can be upheld after *Lee*, as they were in *Clear Creek II*, then prayers at less unique events should be less problematic, not more problematic. And a Policy that merely allows for the possibility of such prayers should be even less problematic.

Somehow, the *Duncanville* and *Santa Fe* courts not only misunderstood this Court's discussion of the significance of graduation in *Lee*, it also misconstrued what the *Clear Creek II* court said about solemnization of graduation. What the *Clear Creek II* court said was this: We accept Clear Creek ISD's assertion that solemnization was a secular purpose for the prayer and also found solemnization to be the primary effect. *Clear Creek II*, 977 F.2d at 966-67. What the *Clear Creek II* court did not say was this: the *only acceptable* secular purpose or primary effect is solemnization.

This points to the first major problem with *Santa Fe*'s solemnization test. The court ignored the other purposes offered by the Santa Fe ISD. The court acknowledged that the school district proffered the following purposes for pre-game message: "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Santa Fe,* 168 F.3d at 812 (quoting Santa Fe ISD's Football Prayer Policy). Yet every purpose except solemnization is completely missing from the court's analysis.

This bodes ill for any and every other event which involves any public facility, official, or other involvement. This Court should roundly declare that solemnization is not the only acceptable secular purpose nor primary effect. As long as this Court continues to use the much criticized test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), it should at least make it clear that *Lemon* will not be narrowed even further. *Any* secular purpose must continue to satisfy *Lemon's*

first prong in prayer cases, not merely the single secular purpose of solemnization.

However, there is a second problem with *the Santa Fe* court's solemnization test. On what grounds can the court say that football games cannot be solemnized? The grounds can only be one thing—the court's *opinion*. There is no legal principle involved here.

Surely different people can hold different views about this issue. Yet the *Santa Fe* court has declared *that as a matter of constitutional law*, football games cannot be solemnized. The Framers of our Constitution would be surprised to find any such principle lurking in their handiwork.

As amici noted at the beginning of this brief, all sorts of prayers are now at risk in this country. What other events may some other court now declare to be "hardly the sober type of . . . event that can be appropriately solemnized with prayer"? *Santa Fe,* 168 F.3d at 823.

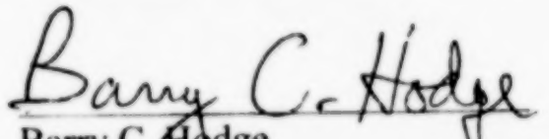
This is not what Establishment Clause jurisprudence should be about in this country. After all, as Justice Douglas said, in a much quoted passage from *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), "We are a religious people whose institutions presuppose a Supreme Being."

Therefore, this Court should flatly reject the "solemnization test" employed by the *Santa Fe* court. This Court should avail itself of this opportunity to strengthen and clarify its Establishment Clause jurisprudence. It should not approve *Santa Fe*'s jurisprudence of hostility. This Court should slam the door on a "jurisprudence" that is nothing more than judges' opinions as to what events they think are solemnizable.

CONCLUSION

For the foregoing reasons, the Fifth Circuit's decision should be reversed.

Respectfully submitted
this 29th day of December, 1999.



Barry C. Hodge
Counsel of Record for Amici Curiae
The National Legal Foundation
11521-E Midlothian Turnpike
Richmond, VA 23235
(804) 897-2340